ECORD
AND
RIEF

No. 17-130

In the Supreme Court of the United States

RAYMOND J. LUCIA, et al.,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

OLIVER J. DUNFORD*
JEREMY TALCOTT
JEFFREY W. MCCOY
**Counsel of Record*
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: odunford@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTION PRESENTED

Whether administrative law judges of the Securities and Exchange Commission are Officers of the United States within the meaning of the Appointments Clause.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE CONSTITUTION ESTABLISHED A GOVERNMENT OF SEPARATED POWERS TO PROTECT INDIVIDUAL LIBERTY 5

II. WITHOUT STRICT ENFORCEMENT OF THE APPOINTMENTS CLAUSE, PUBLIC ACCOUNTABILITY AND INDIVIDUAL LIBERTY ARE THREATENED 8

A. The Appointments Clause Was Intended to Limit Executive and Legislative Power 8

B. The Appointments Clause Was Also Intended To Limit the Diffusion of the Appointment Power to Protect the Governed and Increase Accountability 10

III. THIS COURT'S GUIDANCE IS NEEDED 12

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Bandimere v. SEC,
844 F.3d 1168 (10th Cir. 2016) 4-5, 8, 13-15

Bowsher v. Synar, 478 U.S. 714 (1986) 6, 8-9

Buckley v. Valeo, 424 U.S. 1 (1976) 4, 8, 12

Cummings v. Missouri, 71 U.S. 277 (1866) 10

Decker v. Nw. Envtl. Def. Ctr.,
133 S. Ct. 1326 (2013) 2

Dep't of Transp. v. Ass'n of Am. R.R.s,
135 S. Ct. 1225 (2015) 3, 11

Edmond v. United States,
520 U.S. 651 (1997) 3, 5, 8, 11, 14

Foster v. Vilsack, 820 F.3d 330 (8th Cir. 2016),
cert. denied, 137 S. Ct. 620 (2017) 1

Free Enterprise Fund v. Pub. Accounting Oversight Bd., 561 U.S. 477 (2010) 9, 11

Freytag v. Comm'r of Internal Revenue,
501 U.S. 868 (1991) 3-4, 7, 9-10, 12-15

Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm,
136 S. Ct. 2442 (2016) 2

INS v. Chadha, 462 U.S. 919 (1983) 6, 9-11, 16

Landry v. FDIC,
204 F.3d 1125 (D.C. Cir. 2000) 4, 13

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 16

Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.,
501 U.S. 252 (1991) 2, 7

Morrison v. Olson, 487 U.S. 654 (1988) 10, 16

Nat'l Ass'n of Mfrs. v. Dep't of Def.,
No. 16-299 (U.S. filed Sept. 2, 2016) 1-2

Rapanos v. United States, 547 U.S. 715 (2006) 2

Rothe Dev., Inc. v. Dep't of Def.,
No. 16-1239 (U.S. filed Apr. 13, 2017) 1

Sackett v. EPA, 566 U.S. 120 (2012) 2

U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.,
136 S. Ct. 1807 (2016) 2

United States v. Germaine, 99 U.S. 508 (1879) 11

United States v. Nixon, 418 U.S. 683 (1974) 16

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 6

United States Constitution

U.S. Const. art. I, § 1 6

U.S. Const. art. II, § 1 6

U.S. Const. art. II, § 2, cl. 2 8

U.S. Const. art. III, § 1 6

Federal Statutes

5 U.S.C. §§ 556-557 15

5 U.S.C. § 5372(b) 15

15 U.S.C. § 77u 15

15 U.S.C. § 78v 15

15 U.S.C. § 80a-40 15

15 U.S.C. § 80b-12 15

Rules of Court

Sup. Ct. R. 37.2(a) 1

Sup. Ct. R. 37.6 1

Miscellaneous

The Federalist (J. Cooke ed. 1961)..... 2, 6-7, 10

Jefferson, Thomas, *Notes on the State of Virginia* (William Peden ed. 1955).....9

Kagan, Elena, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2001).....3, 12

Mascott, Jennifer L., *Who Are "Officers of the United States?"*, 70 Stan. L. Rev. --- (forthcoming 2018).....14

Wood, Gordon S., *The Creation of The American Republic 1776-1787* (1969) 7

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Founded in 1973, Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise.

PLF is the most experienced public interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law. PLF's attorneys have participated as lead counsel or counsel for amici in several cases before this Court involving the role of the Article III courts as an independent check on the Executive and Legislative Branches under the Constitution's Separation of Powers. *See, e.g.*, *Rothe Dev., Inc. v. Dep't of Def.*, No. 16-1239 (U.S. filed Apr. 13, 2017) (amici's arguing against Executive Branch's unaccountable use of legislative power); *Foster v. Vilsack*, 820 F.3d 330 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 620 (2017) (*Auer* deference to agency staff testimony); *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, No. 16-299 (U.S. filed Sept. 2,

---

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

2016) (interpretation of Clean Water Act venue statute); *Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016) (*Auer* deference to agency guidance letter); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016) (judicial review of agency interpretation of Clean Water Act); *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326 (2013) (*Auer* deference to Clean Water Act regulations); *Sackett v. EPA*, 566 U.S. 120 (2012) (same); *Rapanos v. United States*, 547 U.S. 715 (2006) (agency regulations defining "waters of the United States").

PLF supports this petition because it raises core Separation of Powers issues related to each co-equal branch's accountability for the exercise of its powers. PLF's policy perspectives and litigation experience offer an additional viewpoint that will assist the Court in reviewing this petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has consistently reaffirmed the central judgment of the Framers that the "ultimate purpose of th[e] separation of powers is to protect the liberty and security of the governed." *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). Indeed, "[n]o political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." *The Federalist No. 47*, at 324 (Madison) (J. Cooke ed. 1961).

Therefore, the liberty and security of the governed are threatened when the carefully balanced scheme of the Framers is not enforced.

In particular here, the question of whether SEC administrative law judges are Officers of the United

States within the meaning of the Appointments Clause implicates the important principle that government must be accountable to the governed. *See Edmond v. United States*, 520 U.S. 651, 660 (1997) ("By requiring the joint participation of the President and the Senate, the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one."); *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 878 (1991) ("The Appointments Clause not only guards against this encroachment [of one branch at the expense of the others] but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power."); Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2332 (2001) ("The lines of responsibility should be stark and clear, so that the exercise of power can be comprehensible, transparent to the gaze of the citizen subject to it.") (internal quotation marks and citation omitted). *Cf. Dep't of Transp. v. Ass'n of Am. R.R.s*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring) ("Liberty requires accountability.").

The lines of responsibility become blurred, and accountability for the exercise of power becomes less comprehensible, when Congress authorizes executive-branch employees to exercise duties of an "Officer of the United States" without subjecting their appointments to the strictures of the Appointments Clause. The growth of the Administrative State—with its ever-increasing oversight by individuals wielding significant power—demands accountability.

The decision below, if allowed to stand, would reduce that accountability. Petitioners here were

subjected to an administrative enforcement action initiated by the Enforcement Division of the Securities and Exchange Commission and conducted by an SEC Administrative Law Judge (ALJ). Pet. App. 37a-38a. In this proceeding, Administrative Law Judge Cameron Elliot heard testimony, including expert-witness testimony; accepted documents into evidence; considered and ruled on objections; weighed evidence; made factual findings; and reached legal conclusions. *Id.* at 115a-237a (ALJ Initial Decision on Remand). Judge Elliot ruled that Petitioners had violated the Investors Advisers Act of 1940, and issued sanctions: permanently barring Mr. Lucia from working as an investment advisor, revoking his (former) company's registration, and imposing civil penalties in the amount of $300,000. *Id.* at 235a.

Petitioners argued that this administrative proceeding was void on the ground that Judge Elliot was an "Officer of the United States" who had not been appointed under the Appointments Clause. Despite this Court's jurisprudence—instructing that an "Officer of the United States" is "'any appointee exercising significant authority pursuant to the laws of the United States,'" *Freytag*, 501 U.S. at 881 (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976))—a panel of the D.C. Circuit held that Judge Elliot was not an "Officer" within the meaning of the Appointments Clause. Pet. App. 9a-21a (disregarding *Freytag* and applying *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000)).

The Tenth Circuit reached the opposite conclusion. In *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016), the court held that an SEC administrative law judge was an "Officer" because, as in *Freytag*, (1) the

position was "established by law," (2) the duties, salary, and means of appointment were specified by statute, and (3) the ALJ "'exercise[d] significant discretion' in 'carrying out . . . important functions.'" *Id.* at 1179-82.

Therefore, this case presents the Court with a clear circuit split on a matter going to the heart of our constitutional structure: May Congress authorize administrative law judges from an executive-branch agency to conduct adjudicatory proceedings without providing for the proper appointments of those judges? That is, does the Constitution allow Congress to create offices in the Executive Branch without also requiring for the appointment of officers under the Appointments Clause?

Finally, as this Court has acknowledged that its "cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers[,]" *Edmond*, 520 U.S. at 661, this case will allow the Court to clarify which Executive Branch employees are "Officers" and "inferior Officers" who must be appointed under the Appointments Clause.

For all of these reasons, this Court should grant the Petition.

ARGUMENT

I. THE CONSTITUTION ESTABLISHED A GOVERNMENT OF SEPARATED POWERS TO PROTECT INDIVIDUAL LIBERTY

"No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than" this: "The accumulation of all powers, legislative, executive, and

judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist No. 47*, at 324 (Madison) (J. Cooke ed. 1961).

To prevent tyranny, then, the Constitution divides the "powers of the . . . Federal Government into three defined categories, Legislative, Executive, and Judicial." *INS v. Chadha*, 462 U.S. 919, 951 (1983). Article I vests "[a]ll legislative Powers . . . in a Congress of the United States[;]" Article II vests "the" executive power "in a President of the United States of America[;]" and Article III vests "[t]he judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. I, § 1; art. II, § 1; art. III, § 1.

"The declared purpose of separating and dividing the powers of government, of course, was to 'diffus[e] power the better to secure liberty.'" *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

But the Framers knew that these mere "parchment barriers" between the branches were not a sufficient guarantor of liberty. *The Federalist No. 48*, at 333 (Madison) (J. Cooke ed. 1961). Therefore, the Constitution also "give[s] to each [branch] a constitutional control of the others," without which "the degree of separation which the maxim requires, as essential to a free government, [could] never in practice be duly maintained." *Id.* at 332. The "constant aim," Madison explained, was "to divide and arrange the several [branches] in such

a manner as that each may be a check on the other." *The Federalist No. 51*, at 349 (Madison) (J. Cooke ed. 1961).

In sum, so that individual liberty may be secured, the Constitution divides power into three branches but also gives to each branch certain powers to check the others. *See The Federalist No. 48*, at 332 (Madison) (J. Cooke ed. 1961):

> [P]ower is of an encroaching nature, and . . . it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others.

See Metro. Wash. Airports Auth., 501 U.S. at 272 ("The structure of our Government as conceived by the Framers of our Constitution disperses the federal power among the three branches—the Legislative, the Executive, and the Judicial—placing both substantive and procedural limitations on each.").

In particular, "because 'the power of appointment to offices' was deemed 'the most insidious and powerful weapon of eighteenth century despotism[,]'" "manipulation of official appointments had long been one of the American revolutionary generation's greatest grievances against executive power." *Freytag*, 501 U.S. at 883 (quoting Gordon S. Wood, *The Creation of The American Republic 1776-1787*, 79, 143 (1969)).

Thus, the Appointments Clause—itself a microcosm of the Constitution's Separation of Powers.

II. WITHOUT STRICT ENFORCEMENT OF THE APPOINTMENTS CLAUSE, PUBLIC ACCOUNTABILITY AND INDIVIDUAL LIBERTY ARE THREATENED

A. The Appointments Clause Was Intended to Limit Executive and Legislative Power

The Appointments Clause "is among the significant structural safeguards of the constitutional scheme." *Edmond*, 520 U.S. at 659. It "embodies both separation of powers and checks and balances." *Bandimere*, 844 F.3d at 1172 (citation omitted). The Clause separates power by "defining unique roles for each branch in appointing officers." *Id.* And it ensures checks and balances by preventing appointments without the cooperation of the Executive and Legislative branches. The President may appoint principal officers only upon Senate approval. U.S. Const. art. II, § 2, cl. 2. "Inferior Officers" may be appointed, upon congressional authorization, only by the President alone, the Heads of Departments, or the Courts of Law. *Id.*

Of course, under the Necessary and Proper Clause, Congress may create "offices" and establish their duties. *See Buckley*, 424 U.S. at 38. But the Constitution "does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts." *Bowsher*, 478 U.S. at 722. Once Congress has "ma[de] its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment

only indirectly—by passing new legislation." *Id.* at 733-34 (citing *Chadha*, 462 U.S. at 958). *See also Freytag*, 501 U.S. at 880 (The Appointments Clause "prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint."); *Free Enterprise Fund v. Pub. Accounting Oversight Bd.*, 561 U.S. 477, 516 (2010) (Breyer, J., dissenting) (The separation-of-powers "principle, along with the instruction in Article II, § 3 that the President 'shall take Care that the Laws be faithfully executed,' limits Congress' power to structure the Federal Government.").

But here, Congress has avoided the strictures of the Appointments Clause by granting to the agents of administrative agencies vast authority without designating those employees as "Officers" within the meaning of the Appointments Clause.[2] In this way, Congress has "'mask[ed], under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments,' [The Federalist], No. 48, p. 310 [(C. Rossiter ed. 1961)] (J. Madison), and thus control[s] the nominal actions (*e.g.*, appointments) of the other branches." *Freytag*, 501 U.S. at 906 (Scalia, J., concurring in part and concurring in the judgment) (citing Thomas Jefferson, *Notes on the State of Virginia* 120 (William Peden ed. 1955)).

And by thus removing from the President (or department heads or courts of law) the power to appoint officers, Congress has arrogated to itself

---

[2] As Petitioners note, Congress does refer to the SEC's administrative law judges as "officers." *See* Pet. 3-4. But Congress does not require that these "officers" be appointed under the Appointments Clause.

significant Executive power—a danger the Framers sought to prevent. *See Chadha*, 462 U.S. at 947 (explaining that the Framers recognized the particular "'propensity'" of the legislative branch "'to invade the rights of the Executive'") (quoting *The Federalist No. 73*, at 494 (Hamilton) (J. Cooke ed. 1961).

B. The Appointments Clause Was Also Intended To Limit the Diffusion of the Appointment Power to Protect the Governed and Increase Accountability

The limits set forth in the Appointments Clause do not exist simply to settle inter-branch squabbles over control of the government. Rather, these limitations go to the heart of a self-governing people. As the Framers understood, "by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people." *Freytag*, 501 U.S. at 884. And the appointment of "Officers" under the Appointments Clause was one means of holding the President accountable: the President is "directly dependent on the people, and since there is only *one* President, *he* is responsible. The people know whom to blame." *Morrison v. Olson*, 487 U.S. 654, 729 (1988) (Scalia, J., dissenting) (emphasis in the original).

Whom should Mr. Lucia blame? He and his (former) company were subjected to a proceeding affecting his fundamental right to pursue an avocation. *See Cummings v. Missouri*, 71 U.S. 277, 321-22 (1866). This proceeding, however, was initiated by agents of the SEC and overseen by another agent of the SEC. And the ALJ who presided over this proceeding wielded significant authority—

permanently barring Mr. Lucia from working as an investment adviser—despite not having been appointed under the Appointments Clause. Is Congress to blame for establishing this administrative process? Or is the President accountable for administering the laws against Petitioners? Mr. Lucia, and others facing the ever-growing Administrative State, should not have to guess whom to hold accountable. *See Ass'n of Am. R.R.s*, 135 S. Ct. at 1234 (Alito, J., concurring) ("Liberty requires accountability."). *See also Free Enterprise Fund*, 561 U.S. at 499 ("Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people.").[3]

---

[3] A common justification for the modern administrative state is efficiency or convenience. *See* Pet. App. 4a-5a (*Lucia* opinion) (discussing Congress' authorizing the SEC to delegate certain functions for greater flexibility and efficiency). This Court has repeatedly rejected the argument that efficiency trumps the Constitution's limitations. *See, e.g.*, *Chadha*, 462 U.S. at 959 (explaining that there is "no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President.").

The Appointments Clause itself recognizes the need for convenience in certain circumstances: The "obvious purpose" in authorizing Congress to vest appointment power of "inferior Officers" in the President alone, in the Courts of Law, or in the Heads of Departments, is "administrative convenience." *Edmond*, 520 U.S. at 660 (citing *United States v. Germaine*, 99 U.S. 508, 510 (1879)). But the Constitution permits no further

Indeed, precisely because bureaucracy is the "ultimate black box of government—the place where exercises of coercive power are most unfathomable and thus most threatening . . . [T]he need for transparency, as an aid to holding governmental decisionmakers to account, here reaches its apex." Kagan, *supra*, at 2332.

This Court should grant Mr. Lucia's Petition and reinforce the doctrine of Separation of Powers, which was established to protect the people's liberties.

III. THIS COURT'S GUIDANCE IS NEEDED

Finally, the important nature of the issues before the Court is matched by the need for clarity. This Court has stated that an "Officer of the United States" is "'any appointee exercising significant authority pursuant to the laws of the United States,'" who "'must, therefore, be appointed in the manner prescribed by'" the Appointments Clause. *Freytag*, 501 U.S. at 881 (quoting *Buckley*, 424 U.S. at 126). In *Freytag*, this Court concluded that the office of "special trial judge" within the U.S. Tax Court had been "established by Law" (the "duties, salary, and means of appointment for that office are specified by statute"); and that these special trial judges exercise significant discretion in carrying out their "important functions" (taking testimony, conducting trials, ruling on admissibility of evidence, and having power to enforce compliance with discovery orders). *Freytag*, 501 U.S. at 881-82. And because of these "significant authorities," the judges' inability to enter final

---

"convenience." Congress may not allow, as here, the "appointment" of inferior officers like ALJs outside of the Appointments Clause.

decisions was not, contrary to the government's arguments, dispositive. *Id.* Therefore, special trial judges are "inferior Officers" within the meaning of the Appointments Clause.

But this "significant authority" prong has led lower courts to different analyses and conclusions—as the circuit split here shows.

The *Bandimere* opinion applied a test derived from *Freytag*. *Id.*, 844 F.3d at 1174-76. *Bandimere* concluded that an SEC administrative law judge was an "Officer" because, as in *Freytag*, (1) the position was "established by law," (2) the duties, salary, and means of appointment were specified by statute, and (3) the ALJ "'exercise[d] significant discretion' in 'carrying out . . . important functions.'" *Bandimere*, 844 F.3d at 1179-82.

The D.C. Circuit, however, applied its decision in *Landry*, 204 F.3d 1125, rather than this Court's *Freytag* opinion. *See* Pet. App. 13a ("[T]o the extent petitioners contend that the approach required by *Landry* is inconsistent with *Freytag* or other Supreme Court precedent, this court has rejected that argument and *Landry* is the law of the circuit[.]") (citation omitted). According to the *Lucia* panel, once an individual "meets the threshold requirement that the relevant position was established by Law and the position's duties, salary, and means of appointment are specified by statute[,]" the "main" criteria for distinguishing inferior Officers from employees (who are not covered by the Appointments Clause) are: "(1) the significance of the matters resolved by the officials, (2) the discretion they exercise in reaching their decisions, and (3) the finality of those decisions." *Id.* 12a (internal quotation marks and citations

omitted). The panel's decision, however, turned on its conclusion that an SEC administrative law judge cannot enter a final decision. *Id.* 13a-16a. As noted, this factor is not dispositive. *Freytag*, 501 U.S. at 881-82.

Regardless, this Court also recognizes that its "cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers." *Edmond*, 520 U.S. at 661. And while *Freytag* may present the best analysis for deciding whether SEC administrative law judges are "Officers," a definitive test would allow lower courts to address an issue whose importance grows along with the size and scope of the Administrative State.

Importantly, it is not clear as a matter of original meaning or as a matter of this Court's jurisprudence that the authority exercised by an employee need be "significant" for that employee to be an "Officer." *See* Jennifer L. Mascott, *Who Are "Officers of the United States?"*, 70 Stan. L. Rev. --- (forthcoming 2018) (demonstrating that the original public meaning of "officer" is "anyone with ongoing responsibility for a statutory duty").[4] The *Bandimere* court identified numerous positions previously held to be "Officers" by this Court:

> • a district court clerk, *In re Hennen*, 38 U.S. (13 Pet.) 230, 258 (1839);
>
> • an "assistant-surgeon," *United States v. Moore*, 95 U.S. 760, 762 (1877); [and]

[4] The latest draft of this article may be found here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2918952.

- "thousands of clerks in the Departments of the Treasury, Interior, and the othe[r]" departments, *Germaine*, 99 U.S. at 511.

Bandimere, 844 F.3d at 1173-74; *see id.* at 1174 (collecting additional examples).

Here, Congress not only refers to SEC ALJs as "officers of the Commission," 15 U.S.C. §§ 77u, 78v, 80a-40, 80b-12; but Congress has also established their duties and salary by law, 5 U.S.C. §§ 556-557 (duties), 5372(b) (salary). And while the SEC's ALJs certainly execute "significant authority" to meet this Court's test in *Freytag* (*see* Pet. 14-16) (listing the SEC ALJs' various powers),[5] they also qualify as "Officers of the United States" under the original meaning and this Court's jurisprudence.

The Court should grant the Petition and adopt a test for identifying "Officers of the United States" that is based on the original meaning of the Appointments Clause and this Court's earlier jurisprudence.

CONCLUSION

The "purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom."

[5] The importance of the functions carried out by the SEC's administrative law judges is demonstrated by the SEC's position that ALJs are "independent." *See, e.g.*, *Bandimere*, 844 F.3d at 1176-77 and n.11. Thus, by the SEC's own lights, its ALJs are not "mere" employees.

Morrison, 487 U.S. at 654 (Scalia, J., dissenting). And the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *Chadha*, 462 U.S. at 951. While each branch's interpretation of its own powers is entitled to "great respect," in the end, "'[i]t is emphatically the province and duty of the judicial department to say what the law is.'" *United States v. Nixon*, 418 U.S. 683, 703 (1974) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

This Court should grant the Petition and reinvigorate the Constitution's fundamental protections of liberty guaranteed by its carefully structured separation of powers.

DATED: August 2017.

Respectfully submitted,

OLIVER J. DUNFORD*
JEREMY TALCOTT
JEFFREY W. MCCOY
**Counsel of Record*
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 429-7747
E-mail: odunford@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation